FOR ARGUMENT

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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

CORA MCRAE, ET AL.,
Appellees.

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,
Appellant,

—v.—

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK

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INTRODUCTION

The principal defendant in this action, the Secretary of HEW, disputes neither the evidence nor the district court's findings of fact on the devastating impact of the Hyde restriction on the lives and health of poor women and the total incomprehensibility of the Hyde standards in medical practice. The Secretary simply ignores them.[1/] Further, the Secretary confirms that, but for the Hyde Amendment, the Social Security Act requires states to reimburse all medically necessary abortions for eligible recipients. U.S. Brief in Zbaraz at 43, n.23. The Secretary agrees with plaintiffs that governmental interests in the potential life of the fetus compete with the Medicaid statute's central purpose of promoting the health of eligible individuals, and that the Hyde Amendment mandates a preference for fetal life at the cost of women's health. U. S. Brief in Zbaraz at 22, 60, 62. The Secretary argues only that, under the most deferential standard,

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1/ The Solicitor explicitly relies here on his Brief for the United States in Williams v. Zbaraz, No. 79-4; Miller v. Zbaraz, No. 79-5; and United States v. Zbaraz, No. 79-491. Brief of the Secretary at 22. References to that Brief will be indicated as "U.S. Brief in Zbaraz."

the government could eliminate abortion funding and demand that women sacrifice their health and even their lives to preserve potential life and encourage childbirth. Brief of the Secretary at 22; U.S. Brief in Zbaraz at 21. Indeed, the Secretary flatly states that Congress could constitutionally eliminate abortion funding altogether. Id. at 62.

Intervening-defendants-appellees (hereinafter "intervening-defendants") distort, but do not dispute, the evidence presented at trial of the health implications of some pregnancies and the arbitrary manner in which the Hyde standard has actually been applied. (See section IB, infra.) The intervening-defendants argue that the judgment of the district court is contrary to Article I, section 9, clause 7 of the Constitution because it "appropriates" money. The government does not join in this claim.

Intervening-defendants take issue with the Secretary, as well as with the plaintiffs, on three other points. First, in flat contradiction to the undisputed facts, they argue that the Hyde Amendments promote state interests in maternal health, as well as fetal life. (See IB, infra; Int-Def. Brief at 59, 94.) Second, they argue that the Secretary and over a

dozen federal courts are wrong in concluding that the Social Security Act requires funding for a broad range of medically necessary services, including medically necessary abortions. Int-Def. Brief at 67-68. Finally, intervenors ignore the plain fact that plaintiffs' claims have consistently been no more than that, given a statutory Medicaid program requiring funding for medically necessary services, it is impermissible to exclude medically necessary abortions. Rather, intervenors would transform plaintiffs' claims into an assertion that the Constitution imposes a duty upon the state to insure access to, and pay for, abortions.

The Secretary and intervening-defendants only partially agree in their approach to appellees' free exercise claims. Both ignore the fact that these claims are also based in a statutory context which automatically accommodates religious and conscientious choice among necessary medical services. Both ignore that the claim is not that the government has an affirmative constitutional obligation to fund the free exercise of religion, but rather seeks to prevent the government from exacting surrender of religious scruples as a condition of access to Medicaid and from

violating its obligation of neutrality with respect to competing religious beliefs. Sherbert v. Verner, 374 U.S. 398, 409, 412 (1963)(Douglas, J., concurring). Beyond this, the government challenges plaintiffs' standing to raise the free exercise challenge. The intervenors take issue with treating conscientious religious decisions with the same respect as religiously mandated conduct and suggest that relief under the Free Exercise Clause should be limited to requiring women seeking abortion based on religious mandates to prove their entitlement to exemption.

The intervening-defendants did not address appellees' Establishment Clause claims. The government addresses only the purpose aspect of the claim, misstates the governing standard, and tries unsuccessfully to explain the district court's distinction between "traditionalist" and "religious" morality by citing sources and courts which, as recognized in Roe v. Wade, 410 U.S. 113 (1973), only confirm the religious nature of the "traditionalist" opposition to abortion, based--as are the Hyde Amendments--on beliefs about the human status of the fetus.

ARGUMENT

I. THE INTERVENING-DEFENDANTS DISTORT THE NATURE OF PLAINTIFFS' LEGAL CLAIMS AND THE DISTRICT COURT'S FINDINGS OF FACT.

A. The Legal Issues Are Distorted By the Intervening-Defendants.

The intervening-defendants attempt to characterize the plaintiffs' claim to the funding of all medically necessary abortions and the decision of the district court as a mandate to fund medically necessary abortions. Int-Def. Brief at 12-13, 33-38. However, plaintiffs' claims, under both the First and the Fifth Amendments, are addressed to the deliberate exclusion of one medically necessary service from a statutory program which creates entitlement from funds already appropriated to payment for a broad range of medically necessary services to eligible individuals and prohibits exclusion on the basis of diagnosis or condition. The question here is framed in the context of a program which reimburses the cost of all medically necessary services, including childbirth, and--but for the Hyde Amendment--would include therapeutic abortions.

Plaintiffs challenge only affirmative congressional action denying funds for

services that are otherwise required by Title XIX. Intervenors argue that the district court's holding would require that if the government builds a recreational park, it must provide for swimming pools and baseball fields "to 'ensure access' for all recreational uses." Int-Def. Brief at 49. That would indeed be absurd, but it has nothing to do with the issues actually presented in this case, which would be more clearly paralleled if the government excluded from the park all persons who had any health impediment.

The Secretary agrees that plaintiffs' Fifth Amendment claims raise an issue of the constitutionality of the exclusion of one service from an otherwise comprehensive program of entitlement. Brief of the Secretary at 21-27.[2/] Poor women seeking abortions

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2/ The Secretary does, however, apparently misunderstand another issue, i.e. the special claims of teen-agers. Brief of the Secretary at 24-28. Plaintiffs' claim did not, as the Secretary suggests, depend on the disparate impact on teen-agers as constitutionally significant. Rather, plaintiffs' claim that the situation of teen-agers requires special scrutiny was based on two other factors. First, the

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face many obstacles. Many are not eligible for Medicaid, in any event. Many live in areas where there is no doctor or clinic or hospital willing to perform abortions. Plaintiffs assert no claim under the Constitution of governmental obligation to facilitate or "ensure access" to abortion. However, when the government acts to withdraw Medicaid entitlement for this one medically necessary

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uncontested evidence is that all of the medical risks and problems of pregnancy are devastatingly greater in relation to teens, particularly very young girls, than in relation to adults. Brief of Appellees at 45-49. Second, the Social Security Act mandates a higher level of benefits and protection for teen-agers then for adults. With respect to adults, the Act's mandate is simply to make funding available for required medically necessary services. The individual must locate a physician willing to serve her. By contrast, with respect to teen-agers, the Act mandates that the state develop a program of "early and periodic screening and diagnosis of individuals who are eligible under the plan and are under the age of 21 to ascertain their physical or mental defects, and such health care, treatment and other measures to correct or ameliorate defects... discovered thereby." Pub. L. No. 90-248, §302(a), 81 Stat. 905 (1968) codified at 42 U.S.C. §1396d(a)-(4)(B). The Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, 92 Stat. 3595, codified at 42 U.S.C. §§300a-21 et. seq., also recognizes the grave problems that pregnancy creates for teen-agers and mandates special programs to address these problems.

service, such affirmative governmental action must meet minimal constitutional standards. Maher v. Roe, 432 U.S. 464, 469, 470 (1977).

Even if Congress is free to repeal the Medicaid statute en toto; even if states are free to withdraw from the program; and even if both are free to further legitimate secular interests by placing reasonable limitations on Medicaid eligibility and the scope of services, it does not follow that funding can be made available for all medically necessary services but not for the single one of abortion. Intervenors cannot transform the claim that this is unconstitutional by asserting wrongly that plaintiffs are claiming a constitutionally based obligation to make funds available for medically necessary abortions even if such funds were not available for other procedures.

B. The Factual Findings Are Distorted By Intervening-Defendants.

Intervening-defendants either distort or entirely disregard the district court's findings of fact. They erroneously claim that the trial court denies any distinction

between elective and medically necessary abortions, thus requiring the government to fund all abortions. Int-Def. Brief at 15-18. This argument implies that abortions performed in any circumstances short of an immediate threat to the woman's life are non-therapeutic.3/

Neither the district court found, nor the plaintiffs assert, that all abortions are medically necessary. The medical witnesses, on whom the court relied, clearly distinguished elective and medically necessary abortions, defining the former as those requested for social or emotional convenience, or for family planning purposes. (Bingham, T.491; Rothschild, T.686-7.) Dr. Rothschild testified that "a significant percentage" of abortions are not medically indicated. (T.687.) Dr. Eliot stated that 33% to 50% of all abortions are not medically necessary. (T.421.)

3/ The intervening-defendants offered this definition of "therapeutic abortion" in the lower court, arguing that: "Therapeutic abortions are those... where pregnancy constitutes a threat to the mother's life." Intervenors' Memorandum on Title XIX of the Social Security Act, Equal Protection, Due Process, and Vagueness Claims, at 19-21. A copy is being lodged with the Court. R.161/162.

Dr. Bingham, in distinguishing abortions of social convenience, qualified this difference for different population groups. While wealthier women more often had abortions for reasons of convenience, among poor women he didn't "know of very many abortions of convenience. These women are already in a very difficult socio-economic, but also a medical situation [so] that their risks are greater."[4/] (T.495.) Intervening-

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4/ Intervening-defendants distort the testimony of Drs. Hodgson and Hofmann by taking it out of the context of their practices. Dr. Hodgson is the only provider of late second-trimester abortions in St. Paul, Minnesota. (T.34-35.) Forty-two percent of her second-trimester abortion patients are dependent upon Medicaid. (T.31-32.) These patients are a high-risk population; they come from as far away as Canada, the Dakotas, and other neighboring states.

Dr. Hofmann testified that all unwanted pregnancies among teen-agers warrant medically indicated abortions. She also deals with a particular, high-risk, population group. Dr. Hofmann elaborated at great length about the devastating physical and mental impact of pregnancy on the adolescent population. The district court relies heavily on Dr. Hofmann's testimony of the physical impact, particularly on young adolescents; intervening-defendants, by singling out only the social impact of adolescent pregnancy, distort Dr. Hofmann's interpretation of medical necessity. Int-Def. Brief at 17.

defendants' witness, Dr. Pisani, agreed that poor women are at greater medical risk in pregnancy. He estimated that they are two to three times more likely than non-poor women to have life-endangering complications. (T.2221.)

Intervening-defendants suggest that the district court's consideration of poverty as a medically relevant factor means that all abortions for indigent women are medically necessary. Rather, the court recognized that since poor women are medically a high-risk group, they would have a higher incidence of medically necessary abortions than higher-income women who lead a "well-nourished life and [have] regular health care." Slip op. at 309. Poverty is thus a factor to be considered in determining impact on the woman's health, but it does not make every abortion medically necessary.

Intervening-defendants similarly distort the lower court's findings on the impact of unwantedness, asserting that it alone would warrant a conclusion of medical necessity. The court found only that it is a "factor deranging the management of pregnancy and aggravating the risks from otherwise controllable complications." Slip op. at 309.

(Emphasis added.) Unwantedness alone does not medically indicate termination of a pregnancy, but in combination with other complications it can make an abortion medically necessary. In some cases, unwantedness can produce severe physical complications.[5/] It can also make it impossible for a woman to follow a proscribed regimen of care that is required because of pre-existing complications or those which develop as a result of the pregnancy. (Romney, A.216.) Or she simply may be unable to obtain the bedrest required to avoid damage to her health. To a woman already suffering from mental illness, an unwanted pregnancy can cause a severe regression and impede her recovery. (See Appellees'Brief at 33; Eliot, T.435; Belsky, A.185.) A patient's will and ability to follow different forms of medical treatment

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5/ Dr. Sloan testified about the physical ramifications of an unwanted pregnancy. Hyperemesis, or excess vomiting, for example, believed to be a psychosomatic reaction to unwanted pregnancy, can become crippling. (A.168-169.) One of Dr. Belsky's patients had lost 18 pounds as a result of this affliction. (Pl. Ex. 159, T.3601, A.280.) Not every unwanted pregnancy will result in hyperemesis, yet stress can be severe enough to bring about this result.

are constant factors in the determination of what constitutes medically necessary treatment.

In discussing familial concerns, the district court found that the "elements of threatened physical or mental health damage are also present in different degrees, which show the pitiably distressed familial circumstances of the pregnant women, and the manifest bearing of familial circumstances on the decision to continue or terminate a pregnancy." Slip op. at 125.

A medically necessary standard does not mean that all abortions sought by poor women will be funded. The number of funded abortions has decreased dramatically in states which have ceased funding elective abortions and instead fund only medically necessary ones. Illinois, for example, funded less than half the abortions reimbursed under an elective standard when it restricted funding to medical necessity. Brief of Plaintiffs-Appellees, Zbaraz, at 7.

Intervening-defendants also claim that the Hyde Amendment, by providing funds for abortion to preserve a pregnant woman's life and for medical procedures alternative to abortion in health-threatening cases,

advances both the interests of protecting maternal health and fetal life, and therefore does not deny women a "basic necessity of life." Intervening-Defendants' Brief at 39. This is absurd and completely ignores the findings of fact. The record amply demonstrates, and the district court found, where Medicaid funding is limited by the life-endangering standard, there are very serious adverse effects on the health, and indeed the very life, of some poor women. The inability of doctors to interpret the life-endangering standard has meant that abortions are denied even for women whose lives are in fact endangered. Slip op. at 91-101.

That the state will pay for abortion where a pregnant woman's life is so clearly in jeopardy that a doctor may be willing to certify an abortion, will not necessarily save her life. The lethal infection that results in pregnancy with an IUD in place is almost impossible to stop once it has begun. (Hodgson, A.197.) And the maternal mortality studies introduced by the intervening-defendants demonstrate that abortion is frequently too late when it is undertaken after the onset of the life-threatening crisis. Brief of Appellees at 57, n.84.

Even if the best medical care can often carry a willing patient through a life-threatening pregnancy, the best medical care cannot insure her against often life-long impairment to her health or safeguard her future childbearing capacity. The best medical care cannot eliminate the increased mortality and morbidity suffered by young teen-agers. (Pl. Exh. 244, at 4, slip op. at 142.)

In the real world, there is no medical solution for the woman whose physical condition demands drugs that may damage the fetus. Medicaid obviously cannot finance a treatment that doesn't exist. The fact that Medicaid will pay vast sums for the medical treatment of the deformed child is not, as intervenors suggest, an "alternative treatment." Similarly, in the real world, there is no magic potion that Medicaid might finance that would dissipate the stress that produces hyperemesis, supra n.3. Where the woman's medical condition is such that pregnancy can be successfully continued only if she spends months in bed, Medicaid will not finance extensive hospitalization solely for the purpose of providing bed

rest.[6] That Medicaid will pay for the complications of illegal abortions, or will finance crisis intervention does not reconcile the competing interests in maternal health and fetal life.

There is no alternative treatment for pregnancy resulting from rape or incest. Forcing plaintiff Ann Moe, a 15-year-old schizophrenic, to continue her pregnancy would result in severe and long-lasting mental health damage, as well as possible physical damage because of her age. (A.113-15.) How, in such a case, could the interest in her health and the interest in fetal life both be served by the Hyde Amendment? (See also Dr. Eliot's description of the impact of pregnancy on a rape victim, A.161-2.)

Intervening-defendants correctly note that there is a long-standing federal commitment to the protection of maternal and

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6/ A disabling pregnancy requiring long hospitalization makes it impossible for a woman to care for her family or, in fact, even to keep her family together. Her children may be separated, placed in foster care, and, as happens repeatedly, never be reunited as a family unit. See Smith v. Organization of Foster Families, 431 U.S. 816, 824, n.10 (1977).

infant health. Int-Def. Brief at 64, n.17. They fail to note that since 1967, the Congress has pursued a vigorous policy of encouraging voluntary family planning and assisting people who wish to avoid the birth of unwanted children.[7] The Congres-

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7/ The 1967 Amendments to the Social Security Act required that states participating in AFDC offer family planning services to all appropriate and eligible individuals. Social Security Act, §402(a)-(15)(B), 42 U.S.C. §602(a)(15)(B). The 1967 amendments also expanded the Maternal and Child Health programs, created by Title V of the Social Security Act, to include family planning services. Act, §503(a)(3), 42 U.S.C. §708(a)(3). In 1970 Congress determined that greater federal effort was necessary to achieve the goals of voluntary family planning. The Family Planning Services and Population Research Act of 1970, added as Title X of the Public Health Service Act, was adopted for the specific purpose of "making comprehensive voluntary family planning services readily available to all persons desiring such services." Pub. L. 91-572, Sec. 2(1), Declaration of Purpose, 42 U.S.C. §300, historical note. In 1972 Congress required that family planning services be a mandatory element in all state Medicaid programs. Act §1905(a)(4)(c), 42 U.S.C. 139-bd(a)(4)(C). Congress also increased the level of federal matching funds for family planning services now required under both Medicaid and AFDC so that the federal share was 90%. Social Security Act, §1903(a)(5), 403(3), 42 U.S.C. §§1396(a)(5)(Medicaid), 603(e)(AFDC). The 1974 Amendments provided that states which did not comply with the federal

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sional history of programs encouraging voluntary family planning negates any assumption of federal purpose to encourage the birth of unwanted children. Slip op. at 293. Intervening-defendants argue that the denial of medically necessary abortions somehow protects maternal and child health.[8/] The assertion is absurd.

(footnote continued from preceding page)

family planning requirements would be penalized by a one percent reduction in general AFDC federal matching funds, thus providing a more effective remedy for assuring that states provide the voluntary family planning services Congress deems essential. Social Security Act, §403(f), 42 U.S.C. §603(f).

8/ Intervening-defendants assert that Title V does not contemplate "abortion as a solution to maternal health problems." Int-Def. Brief at 64, n. 17. While abortion is not considered to be a "method of family planning" under the federal statutes, supra n. 7, local agencies receiving funds under Title V and Title X are specifically required to make referrals for all appropriate medical treatment, including medically necessary abortions. 42 C.F.R. §51a.130(f)(3), 42 C.F.R. §59.5(d), 42 C.F.R. §69.6(3), Program Guidelines for Project Grants for Family Planning Services, U.S. Dept. of Health, Education and Welfare (January, 1976), at 1, 15, 17, 22, Valley Family Planning v. The State of North Dakota, 475 F.Supp. 100, 104-05 (D.N.D. 1979).

The district court's findings of fact are a proper exercise of its judicial function. The court was not assessing the wisdom of legislative policy, but rather exploring the facts essential to a reasoned application of the law. Plaintiffs' First and Fifth Amendment claims assert that the actual purpose animating the Hyde restriction is constitutionally impermissible. Plaintiffs assert that the magnitude of the threat to their life and health is constitutionally relevant, and that the Hyde restriction in fact serves no legitimate purpose. Plaintiffs claim that the Hyde standard is impermissibly vague and uncertain, on its face and as applied. The district court was obliged to evaluate the factual basis of these claims so the court could conclude that the asserted government interest in encouraging normal childbirth is not, and cannot be, furthered by the Hyde Amendment. The district court's findings will enable this Court to review the legal conclusion that the Hyde Amendment is unconstitutional.

II. APPROPRIATIONS RIDERS ARE NOT IMMUNE FROM JUDICIAL SCRUTINY. CLASSIFICATIONS CREATED IN GOVERNMENT BENEFIT PROGRAMS MUST MEET MINIMAL CONSTITUTIONAL STANDARDS. THE UNCONSTITUTIONALITY OF A PENALIZING CONDITION FOR EXCLUSION DOES NOT MANDATE JUDICIAL DESTRUCTION OF THE ENTIRE STATUTORY PROGRAM.

Intervening-defendants and certain amici contend that this Court does not have the power to review congressional decisions on appropriations matters.[9/] (See Brief of Intervening-Defendants at 20-33, and the Brief Amici Curiae of Certain Congressman at 14-24.)

9/ Central to intervening-defendants' contention that Congress has refused to appropriate funds for medically necessary abortion is its characterization of the Hyde Amendment as "Holman Rule"--House Rule XXI, Rules and Manual of the House of Representatives for the Ninety-Sixth Congress (House Doc. No. 95-403). However, the Holman Rule is limited to those provisions which "shall retrench expenditures." Id. To be a Holman Rule, the limiting amendment must necessarily, and not just probably, reduce expenditures under the Bill. Id. at §844. It must be "apparent that the prohibition will reduce amounts covered by the bill...and that the funds not otherwise used as a result of the amendment would not otherwise be allocated to other classes of recipients." Deschler's Precedents of the U.S. House of Representatives, Chapter 24, §10.7. Because the cost of pre-natal care and childbirth is over (footnote continued on next page)

In United States v. Lovett, 328 U.S. 303 (1946), this Court held unconstitutional, as a Bill of Attainder, the refusal of Congress to appropriate funds to pay the salaries of certain government employees alleged to be "subversive." Id. at 305. As here, Article I, section 9, clause 7 of the Constitution was invoked to support the claim that the challenged statute was not "justiciable" because it "involved simply an exercise of congressional powers over appropriations... [and was] not subject to judicial review." Id. at 306-07. At oral argument in Lovett, counsel for Congress conceded that the logic of this argument compelled the conclusion that a congressional provision that "no

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seven times the cost of abortion, Brief of Plaintiffs-Appellees in Zbaraz at 7-8, the Hyde Amendment will increase expenditures dramatically, and cannot, therefore, come within the Holman Rule. As Mr. Justice Stevens correctly observed in denying the state's application for a stay in Williams v. Zbaraz, "it is less expensive for the State to pay the entire cost of an abortion than it is for it to pay only its share of the costs associated with a full term pregnancy." U.S. , 99 S.Ct. 2095, 2098 (1979).

Negro shall be paid a government salary" would be unreviewable by the courts. 14 U.S.L.W. 3379, 3380 (U.S. May 7, 1946). The same must be conceded here.10/

In Lovett, Congress attempted to avoid judicial review of a measure to prevent certain politically unpopular persons from holding government employment by labeling its action a "mere appropriation measure." 328 U.S. at 313-14. Here, self-appointed congressional spokesmen assert the appropriations label to insulate from review an act deliberately designed to prevent certain women from obtaining politically unpopular, though medically necessary, abortions.

10/ The circumstances of Lovett and McRae are strikingly similar. Writing for the majority in Lovett, Justice Black examined the legislative history and political background of the challenged measure, noting a preoccupation with "subversives" in the House of Representatives to such an extent that "it became the practice to include a ... prohibition [of "subversives" in federal employment] in all appropriations acts...." 328 U.S. at 308. The bill, proposed by the House, was opposed by the Senate, and, after the conference deadlocked, was finally enacted only because the House threatened to hold hostage the entire wartime appropriation without it. Id. at 312-13.

This Court firmly rejected the appropriations argument in Lovett:

> Were this case to be not justiciable, Congressional action, aimed at three individuals, which stigmatized their reputation and seriously impaired their chance to earn a living, could never be challenged in any court. Our Constitution did not contemplate such a result. To quote Alexander Hamilton, "...a limited Constitution ...[is] one which contains specified exceptions to the legislative authority.... Limitation of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void." Federal Paper No. 78.

328 U.S. at 314.

Similarly, here, as the district court points out, Congress cannot "determine the validity of [its] own laws by framing them as funding laws." Slip op. at 291. Moreover, to permit it to do so would nullify the power and duty of the Supreme Court to enforce and interpret the Constitution as the supreme law of the land. Marbury v. Madison, 1 Cranch 137 (1803).

Intervenors also argue that plaintiffs'

claims are not justiciable because they present a political question. (See Int-Def. Brief at 29-33.) However, this Court, as the "ultimate interpreter of the Constitution," has refused to find even the exercise by the House of Representatives of its power to judge the qualifications of its own members a non-justiciable political question. Powell v. McCormack, 395 U.S. 486, 521 (1969). Lovett makes clear that, notwithstanding Article I, section 9, clause 7, appropriations are also justiciable. Plainly, none of the criteria in Baker v. Carr, 369 U.S. 186, 217 (1962), warrants a finding that the Hyde Amendment is a political question.

Lovett does not support the suggestion that this Court, upon finding the Hyde restrictions unconstitutional, must or even could remand to Congress for further review of the question. The opinion in Lovett concludes:

> Much as we regret to declare that an act of Congress violates the Constitution, we have no alternative here. Section 304 therefore does not stand as an obstacle to payment of compensation to Lovett,

> Watson, and Dodd. The judgment in their favor is affirmed.11/

328 U.S. 318. There is absolutely no suggestion that the Supreme Court considered the judgments in Lovett in any way contingent upon further congressional action. Indeed, if the Court believed its judgment was merely contingent upon congressional acceptance or rejection, the opinion would be merely advisory and outside the jurisdiction of an Article III court. Muskrat v. United States, 219 U.S. 346, 362 (1911); Hayburn's Case, 2 U.S. (2 Dall.) 409, 410 (1792).

That Congress did in fact decide to appropriate the funds ordered by the Court in Lovett does not support the suggestion

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11/ The judgment in the Court of Claims affirmed by this Court concluded: "Plaintiff Robert Morse Lovett in case No. 46026 is entitled to recover $1,996.40; plaintiff Goodwin B. Watson in case No. 46027 is entitled to recover $101.78; and plaintiff William E. Dodd, Jr. in case No 26028 is entitled to recover $59.83. Judgments will be entered accordingly. It is so ordered." 66 F.Supp. 142, 148 (Ct. Cl. 1945).

of the Amici that the Court must, or even could, remand a case to the Congress for it to determine whether to take the Supreme Court's advice as to the constitutionality of an appropriations restriction.12/

12/ Lovett returned to the Congress only because it began as an action in the Court of Claims for money owing, and at that time, it was unclear whether the Court of Claims was an Article III Court, or an Article I, legislative court. See Williams v. United States, 289 U.S. 553 (1933). In the Supreme Court, all parties treated the Court of Claims judgment as final and judicial because all sought Supreme Court review on the merits. It was only after remand from this Court that the Article I legislative aspect of the judgment became apparent. See Ely, "United States v. Lovett: Litigating the Separation of Powers," 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 1, 8-10 (1975). Ely observes that "authority for the proposition that Article I, section 9 renders appropriations orders immune from judicial review was of less than overwhelming force." Id. at 18. He found the brief of the Congress "subject to several criticisms. The opening argument that the constitutional claims were not justiciable got it off to a weak start. As noted above, the argument was not intrinsically strong, and it had unceremoniously been brushed aside by the Court of Claims." Id. at 26. However, that issue is not even presented in this case; the district court is an Article III court not subject to the review or supervision of Congress.

Just last term in Califano v. Westcott, 99 S.Ct. 2655 (1979), the Court explored the issue of judicial remedies for unconstitutional exclusions and conditions in government benefits programs. Both the majority and dissenting opinions cite Mr. Justice Harlan's statement of the issue:

> Where a statute is defective because of underinclusion, there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion. Welsh v. United States, 398 U.S. 333, 361 (1970)(concurring opinion). Cited in Califano v. Westcott, 99 S.Ct. 2663 (Mr. Justice Blackmun) and 2666 (Mr. Justice Powell).

The test to determine whether extension or invalidation is the proper remedy for a constitutionally infirm statute is "whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it...to render what Congress plainly did intend, constitutional." Welsh v. United States, 398 U.S. at 355-56. In determining which of these remedies Congress would prefer, several factors are relevant, including

the presence or absence of a severability clause in the statute, the extent of Congress' commitment to the underlying statutory program and the amount of disruption to the statutory scheme that might accompany extension on the one hand or invalidation on the other. An analysis of these factors in this case ineluctably supports the remedy ordered by the district court, i.e. striking the exclusion of Medicaid benefits for medically necessary abortions.

Congress has specifically provided that extension is the proper remedy where limitations or conditions upon entitlements created by the Social Security Act are held unconstitutional. Section 1103 of the Social Security Act, 42 U.S.C. §1303, provides that, in the event "any provision of this Chapter, or the application thereof to any person or circumstance, is held invalid, the remainder of the Chapter and the application of such provision to other persons or circumstances shall not be affected thereby." Consistent with this provision, this Court has uniformly extended benefits whenever a congressional restriction upon Social Security Act benefits has been found unconstitutional. Califano v. Westcott, 99 S.Ct. 2655 (1979)

(benefits to children of unemployed mothers); Califano v. Jablon, 430 U.S. 924 (1977) aff'g 399 F.Supp. 118 (D.Md. 1975)(old-age or disability benefits to husbands of wage-earning wives without dependency requirement); Califano v. Goldfarb, 430 U.S. 199 (1977)(survivors benefits to male spouses without dependency requirement); Weinberger v. Weisenfeld, 420 U.S. 636 (1975)(benefits to surviving father of minor children based on earnings of deceased wife); Jimenez v. Weinberger, 417 U.S. 628 (1974)(benefits to illegitimate children born after onset of parent's disability who are dependent on disabled parent); Graham v. Richardson, 403 U.S. 365 (1971)(welfare benefits to resident aliens and aliens who have not resided in U.S. for a specified number of years); Shapiro v. Thompson, 394 U.S. 618 (1969)(benefits under AFDC program to all otherwise-eligible recipients in state regardless of length of residency).

The normal, indeed invariable, rule in public benefit cases has been to extend benefits to the excluded class rather than to invalidate the entire program. In addition to the Social Security Act cases cited above, this Court has followed the practice

of restoring unconstitutionally excluded benefits in a variety of other government benefit cases. See, e.g., Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (medical care to all indigents regardless of length of residency); United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (food stamps to households of people unrelated by blood or marriage in the face of explicit congressional desire to exclude such groups); Frontiero v. Richardson, 411 U.S. 677 (1973)(benefits to dependents of service women which are provided to dependents of service men); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973)(per curiam)(benefits extended to illegitimate children of working poor under state program). This Court has never ordered that an unconstitutional condition or exclusion in a government benefit program be remedied by invalidating the entire program.

Califano v. Westcott, supra, affirms the correctness of this consistent line of authority. There, both the majority and dissenting opinions agreed that providing benefits to children of unemployed fathers,

but not unemployed mothers, was an unconstitutional exclusion; and both affirm the judicial power to extend benefits to unconstitutionally excluded groups. The difference between the majority and dissent in Westcott rests on their reading of congressional intent with respect to appropriate remedy. The majority upheld the extension of benefits because not only was it "the simplest and most equitable" solution possible, 99 S.Ct. at 2655, but an injunction suspending the program's operation would impose hardships on beneficiaries whom Congress plainly meant to protect. (Three hundred thousand needy children would have been deprived of the basic necessities of life.) 99 S.Ct. at 2664. The dissent, on the other hand, interpreted the primary intent of Congress at the time the gender classification was made to be to limit benefits in the interest of conserving public funds, and therefore would have "enjoined any further payment of benefits under the provision found to be unconstitutional," i.e. the entire AFDC-U program. 99 S.Ct. 2666.

This case is similar to Westcott in that in both there is plain evidence of

congressional intent to deny benefits to the excluded groups.[13/] To the extent that this case differs from Westcott, these differences make the appropriateness of extension more plain here. In Westcott, the extension of benefits represented a significant increase in cost.[14/] Here, by contrast, striking the Hyde restrictions saves public funds. (See n.6, supra.) Nullification of Medicaid, or of the HEW/Labor Appropriations Act, would have an even more immediate and devastating impact upon millions of patients, and thousands of physicians and hospitals. It is beyond belief that Congress would prefer that result. Neither Congress nor a single state chose or even debated that option after the Hyde Amendment was first enjoined in 1976.

13/ The intervening-defendants' attempt to distinguish Westcott on the ground that the "Court could infer that Congress would have preferred to benefit the excluded class" is fallacious. Int-Def. Brief at 28. In Westcott the exclusion was adopted in 1968 as part of a general statutory revision "to tighten standards for eligibility and reduce program costs." 99 S.Ct. 2655.

14/ In Westcott, Massachusetts estimated that the extension of AFDC-U benefits to families where the mother was unemployed would cost an additional $21.5 million, while the existing program for families with an unemployed father cost $30 million. Brief for Appellant Sharp at 36.

III. NONE OF THE ISSUES RAISED BY DEFENDANTS RESPECTING THE FIRST AMENDMENT CLAIMS HAS MERIT.

A. Plaintiffs-Appellees Have Standing To Challenge the Hyde Amendment Under The Free Exercise Clause.

For the first time in this litigation, the government specifically challenges plaintiffs' standing to raise the free exercise claims. The issue is a false one. There is no question that the Women's Division of the Board of Global Ministries of the United Methodist Church (hereinafter "Women's Division" or "Division") has standing to represent those members of plaintiffs' class with free exercise concerns.[15/] The Solicitor's argument confuses traditional and introduces novel propositions of a purely prudential nature.

15/ After trial, the district court certified the plaintiffs' class as including "women of all religious and non-religious persuasions and beliefs who have in accordance with the teaching of their religion and/or the dictates of their conscience determined that abortion is necessary." (A.92-94).

Although the government does not challenge the district court's findings that a woman's decision to seek a medically necessary abortion may be dictated by her religious convictions, Brief of the Secretary at 31-32, n. 17, it suggests in a footnote that it was

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The Women's Division has clear standing to represent its members whose free exercise rights are infringed by the Hyde Amendments. It is settled that an organization can represent its members where:

> (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germaine to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977).

It is undisputed that the membership of the Women's Division includes women who could sue in their own right. The uncontested testimony of Theressa Hoover, Associate General Secretary and Chief Executive Officer of the

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improper for the district court to base these findings on the testimony of religious representatives. This contention not only ignores the effect of the stipulation but also the fact that theological testimony and writings are frequently the most important source of illumination of religious belief. See: Wisconsin v. Yoder, 406 U.S. 205, 209-213 (1972); United States v. Seeger, 380 U.S. 163, 180-183 (1965); cf. School District of Abington v. Schempp, 374 U.S. 203, 209-210 (1963).

Women's Division is that the Women's Division counts among its members "pregnant Medicaid eligible women who, as a matter of religious practice and in accordance with their conscientious beliefs, would choose but are precluded or discouraged from obtaining abortions reimbursed by Medicaid because of the Hyde Amendment ..." (A. 132).[16] This gives the Division standing to raise those members' claims. Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 343 (1977); Warth v. Seldin, 422 U.S. 490, 511 (1975); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 685-88 (1973); Sierra Club v. Morton, 405 U.S. 727, 739 (1972). It also satisfies the strict test of coercive effect on individual free exercise stated in School District of Abington v. Schempp, 374 U.S. 203, 223 (1963); Board of Education v. Allen, 392 U.S. 236, 249 (1968). There is no requirement, as the Solicitor would have it, that a particular class member be identified or joined as a plaintiff to establish representational standing. Brief of the Secretary at 34.

16/ The government stipulated that her affidavit would be admitted into evidence. (R. 119).

The Solicitor does not and cannot assail the community of interest between the Division and its members. The Division's interest in protecting the exercise of religious liberty from governmental interference is obviously central to its purpose as a religious organization. Affidavit of Theressa Hoover, ¶¶3,6, (A. 130, 131). See: Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 344. Rather, he contends that because the rights asserted are "personal" the Division should not be allowed to represent its members. Brief of the Secretary at 34-35.[17/]

17/ Because the record establishes the existence of Division members who are threatened with, and suffer immediate harm as a result of, implementation of the Hyde Amendments, there is no question that the "personal stake in the outcome," the prerequisite to an Article III case or controversy, is established. Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962). The Solicitor's contention, that individual women would be better plaintiffs than the Division, is only prudential and cannot be raised at this late date after "an authoritative constitutional determination" and in circumstances where "the applicable constitutional questions have been and continue to be presented vigorously and 'cogently.'" Craig v. Boren, 429 U.S. 190, 193-94 (1976). In addition, the prudential argument should be considered waived under Fed. R. Civ. P. 12(h). Although lack of standing generally was pled in the Secretary's Answer to the Amended Complaint, ¶17/R.101, and rejected below, slip op. at 281-283, the government never raised the specific free exercise standing question pressed here, even in response to the class certification order. Compare Craig v. Boren.

The fact that the substantive right affected is personal neither requires individualized proof nor warrants departure from the settled principles of associational standing. NAACP v. Alabama involved the exercise of equally personal First Amendment rights. 357 U.S. 449 (1958). There is also no need for individualized proof in order for the members to obtain the wholly prospective relief sought. Warth v. Seldin, 422 U.S. at 515-516; Hunt v. Washington State Apple Advertising Commission, 432 U.S. at 344. The Division seeks to enjoin a categorical exclusion which impedes its indigent pregnant members from implementing the principles of responsible parenthood and therefore, "it can reasonably be supposed that ... [invalidation of the Hyde Amendments] will inure to the benefit of those members of the association actually injured." Warth v. Seldin, 422 U.S. at 515.[18/]

18/ This case is different from the conscientious objector cases where the law requires assessing the nature of the belief and the sincerity of the individual applicant, regardless of his religious affiliation. United States v. Seeger, 380 U.S. 163, 185 (1965). Even if such an individualized assessment were required here, as the intervening defendants erroneously contend, see III, B, infra, the Division could still appropriately represent its members' interest in removing the absolute preclusion.

Finally, the Solicitor confuses associational standing with jus tertii when he argues that organizational standing should be permitted only if there is a "compelling reason why the members of a religious organization cannot speak for themselves ..." Brief of the Secretary at 35. See: Singleton v. Wulff, 428 U.S. 106, 115-116 (1976). Although this consideration underlay the early recognition of associational standing in NAACP v. Alabama, 357 U.S. at 489, it has never been a test of organizational standing. See, e.g., United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). The Court implicitly rejected a similar contention in Hunt where it was urged that the members represented were "under no disabilities which prevent them from coming forward to protect their own rights ..." 432 U.S. at 342. Indeed, such a test would vitiate the concept of organizational standing. It would be particularly anomalous to impose such a test where the Religion Clauses are involved given the importance of raising these issues. See: Flast v. Cohen, 392 U.S. at 103-104.

Nonetheless, for the reasons recognized by the Court in Singleton v. Wulff, there are many obstacles to a woman's assertion of her

own rights in an abortion case. 428 U.S. at 117. The need for representational standing is greater here. If the Division's standing were not recognized, free exercise rights in the abortion context would routinely be chilled rather than judicially vindicated.[19/]

[19/] Since the Division's standing to represent its members is so clear, plaintiffs-appellees simply note that it also has standing in its own right to raise both establishment and free exercise issues given their close nexus in this case. Cf. Flast v. Cohen, 392 U.S. at 102-104, n. 25; Engel v. Vitale, 370 U.S. 421, 430-431 (1962). The Division is directly injured because the Hyde Amendment disparages its moral beliefs in abortion and impedes the efficaciousness of its teaching through burdening its indigent members. Moreover, as a member of the Religious Coalition for Abortion Rights, the Division has expended economic and personal resources to combat the Hyde Amendment. Affidavit of Theressa Hoover (A.130). Whereas the Court has not considered whether the costs of fighting a law justify standing, the special concerns of the Religion Clauses warrant recognizing, as demonstrative of the requisite stake in the outcome, expenditures by a religious organization to protect the free exercise rights of its members. Cf. Flast v. Cohen, 392 U.S. at 103-104. In addition, the Division's standing to raise the establishment clause violation and special relationship to its members qualifies it under the principles of jus tertii. Singleton v. Wulff, 428 U.S. at 114-119.

B. Defendants' Arguments Ignore the "Governmental Obligation of Neutrality" Imposed Where Religious Liberty is at Issue.

Defendants' remaining contentions completely ignore the "'governmental obligation of neutrality' originating in the Establishment and Freedom of Religion Clauses of the First Amendment." Maher v. Roe, 432 U.S. at 474, n. 8. Plaintiffs-appellees' claim is not that "the government must bear the cost of each person's religious observances," Brief of the Secretary at 36, but rather that in the context of the Medicaid program the government cannot exclude those whose religious and conscientious convictions require recourse to medically necessary abortion while covering those whose religious beliefs dictate childbirth or some other form of medically necessary service. See: Sherbert v. Verner, 374 U.S. at 406.[20/]

20/ Oddly, the Solicitor never even cites Sherbert, although it was specifically distinguished by this Court in Maher, 432 U.S. at 474, n. 8. The intervening defendants distort it. Int.-Def. Brief at 52, n. 11. The rule in Sherbert denied benefits to those who would not work on Saturday for any reason. The rule here denies benefits to all those who need medically necessary but non-life endangering abortions.

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Defendants' suggestion, Brief of Secretary at 38, and Int.-Def. Brief at 52, that non-discriminatroy funding of medically necessary abortion in accordance with religious or conscientious convictions would constitute an establishment of religion was squarely rejected by this Court in Sherbert, 374 U.S. at 409. Funding in accordance with religious convictions -- whether they counsel "conscientious decision" or "conscientious nonparticipation," slip op. at 328--is a basic principle of the Medicaid program and

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Contrary to the intervening defendants' suggestion, the rule in Sherbert did not deny benefits because of the plaintiff's Sabbatarian practice but in spite of it. There, as here, the rule affects religious practice indirectly; and, here as there, the First Amendment requires funding where the effect of ineligibility is to coerce abandonment or penalize the free exercise of religion, particularly where contrary beliefs are not so constrained.

Norwood v. Harrison, 413 U.S. 455 (1973), relied on in Maher at 477, for the proposition that state aid to private schools is not required simply because public school education is provided, is inapposite here. Maher paralleled Norwood insofar as the claim to funding for elective abortion represented extension of the program to encompass a private choice not otherwise within the Medicaid program. This case, however, involves funding for a medically necessary service which, before the Hyde Amendment, was an included service. The discrimination here cannot be justified by a private/public distinction. The discrimination in this case is in the public program itself.

"reflects nothing more than the governmental obligation of neutrality in the face of religious differences ..." Sherbert, 374 U.S. at 409.[21]

There is absolutely no conflict between the accommodation of religious differences in the context of the Medicaid program and the no establishment principle. Id.[22]

Abortion is simply a secular medical

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[21] 42 U.S.C. §1396f, which was included in Title XIX at the request of the Christian Scientists, embodies the principle that no person shall be compelled to accept medical service which violates their religious beliefs. In most cases, alternative care is automatically provided by the regular medical personnel or facility involved in treatment. The intent to provide for altnerative care is underscored, however, by Title XIX's inclusion of Christian Science sanitoria, which are outside the normal health care channels. 42 U.S.C. §1396d.

In the related context of family planning, Congress requires that participation be strictly voluntary. 42 U.S.C. §300a-5. The debates make clear the concern to protect individual decisions of conscience. 116 Cong. Rec. 24092, 24097, 37375, 37384-86 (1970). 42 U.S.C. §300a-7, relating to provision of abortion and sterilization in federally supported hospitals, mandates respect for conscientious convictions, whether or not they could be shown to be religiously grounded.

[22] By contrast, the free exercise demand for parochial school funding is readily distinguishable on

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service; it is not equivalent to a religious rite or a Bible. That it may be chosen in accordance with religious belief is as irrelevant to Establishment Clause concerns as is the Medicaid coverage provided for religiously dictated, albeit dangerous childbirth or the alternative care necessitated by a Jehovah Witness' refusal to have a blood transfusion. Even with respect to parochial schools, the state may fund secular welfare services so long as they are clearly separable from the religious mission of the institution. See, e.g., Everson v. Board of Education, 330 U.S. 1, 17-18 (1947); Wolman v. Walter, 433 U.S. 229, 242-244 (1976).

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a number of grounds. First, it is similar to the claim rejected in Norwood that the state cannot prefer a public school program to a private one. See n. 20 supra at 40. The important and clearly secular function of the public schools in our pluralistic society is indisputable. See Everson v. Board of Education, 330 U.S. at 23-24 (Jackson, J., dissenting); School District of Abington v. Schempp, 374 U.S. at 241-242 (Brennan, J., concurring). Second, for the state to assist the parochial schools generally would constitute aid to a religious institution in violation of the Establishment Clause. See, e.g. Committee for Public Education v. Nyquist, 413 U.S. 756 (1973). Conversely, funding of secular medical services in accordance with the dictates of conscience does not advance any one belief but respects all. Third, the indisputably secular reasons for maintaining a public school system distinguish it from the Hyde Amendment's preference for the fetus over maternal life and health, which reflects a primary purpose and effect to advance the religious tenet that views abortion as murder.

The principle that no state may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-Believers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation," Everson, 330 U.S. at 16 (emphasis in original), prohibits distribution of aid which discriminates, directly or indirectly, between different religious positions. Sherbert, 374 U.S. at 410. The preference for childbirth over medically necessary abortion includes the Catholic or Lutheran because of their faith, while excluding the United Methodist and others because of theirs. It is as if the state provided diagnostic health services only to children who, for reasons of faith, education, or convenience, attend Catholic schools, while denying such service to those attending Quaker schools.

The intervening defendants' contention that the Free Exercise Clause does not protect religiously-grounded conscientious decisions "when they are not mandated by specific and affirmative corporate tenets of some religious group," Int.-Def. Brief, p. 50, also offends the guarantee of neutrality. They suggest that a religiously mandated course of

conduct is protected by the Free Exercise Clause, whereas a religious duty to make an individual conscientious decision is not. Such a distinction, however, would impermissibly prefer categorical dogma over conscientious faith.[23/] In Gillette v. United States, 401 U.S. 437 (1971), the Court squarely recognized that conscientious belief is protected by the Free Exercise Clause.[24/] Cf.: United States v. Seeger, 380 U.S. 163, 176 (1965).

The preference suggested by the intervening defendants would not only ignore the diversity of modern religious thought and

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23/ Thus, as the intervening defendants' witness, Father Smith, testified, a reverse Hyde Amendment, which funded only abortion, would burden the free exercise of the observant Catholic because abortion is absolutely forbidden. (A. 231-233). Moreover, the distinction between categorical and conscientious faith is inherently false because one who claims protection for a dogmatic position has opted, whether consciously or unconsciously, to accept rather than reject the mandated course.

24/ The petitioner Negre claimed that participation in the Vietnam War violated his free exercise as a Catholic because he had made an individual conscientious determination in accordance with his faith that that war was unjust. His claim was rejected because of overriding neutral and legitimate interests, not because his objection was conscientiously as opposed to categorically determined. 401 U.S. at 440-441, 461.

practice, cf.: Torcaso v. Watkins, 367 U.S. 488, 495 (1961); United States v. Seeger, 380 U.S. at 180-183 (1965), but also the fundamental principle of the First Amendment that religion must be voluntary.[25] This means not only that the state may not augment religion's power to persuade, Walz v. Tax Commission, 397 U.S. 664, 667-669 (1970); School District of Abington v. Schempp, 374 U.S. at 262-263 (Brennan, J., concurring); it also means that the state may not prefer those religions which dictate the religiously-required course over those which remand the decision to voluntary, conscientious determination by the individual.[26]

25/ In the Memorial and Remonstrance, Madison wrote: "... Religion ... must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate." Everson v. Board of Education, Appendix, 330 U.S. at 64 (Rutledge, J., dissenting).

26/ The forces which led the struggle for the First Amendment -- the Baptists, Protestant Evangelicals, the Deists and Rationalists -- attest to the cardinal nature of the principle of voluntarism matters of individual conscience. L. Pfeffer, Church, State and Freedom, 88-93 (1953).

The theological testimony, from both sides of the abortion controversy, demonstrates that the duty conscientiously to consider abortion is as fundamental, grave and sacred a concern for those of the pro-choice religions as the duty absolutely to reject abortion is for those of the anti-abortion faiths. Either way, this duty ranks among the highest obligations of the believer. Brief of Appellees, Facts, §9. The district court correctly held that both are entitled to equal protection under the Fifth and First Amendments.

The final contention of the intervening defendants is that proper relief under the Free Exercise Clause requires "fashion[ing] an exemption for bona fide members of those religious organizations which mandate abortion." Int-Def. Brief at 53. The suggestion is completely untenable as well as inconsistent with the "governmental obligation of neutrality." Here, the proper remedy under the Free Exercise Clause is not individualized exemption, but invalidation of the Hyde Amendments.

First, there is no place for such a test in a Medicaid scheme which has, as a general operating principle, respect for religiously

based and conscientious convictions.[27] The Medicaid program implements this principle without the intervention of special boards to test the sincerity of anyone's convictions. To set up a special procedure for women whose religious convictions dictate refusal of childbirth and the necessity of abortion services would impermissibly single out one class of recipients for special treatment.

The discriminatory nature of a sincerity test for medically necessary abortions is particularly pointed. Those whose religious or conscientious convictions preclude considering abortion would be unqualifiedly eligible for Medicaid reimbursement for prenatal care and childbirth. Congress cannot, consistent with the principles of free exercise neutrality and equal protection, discriminate by burdening some religious and conscientious beliefs with a test of sincerity and not others. See Everson v. Board of Education, 330 U.S. at 15-16 (1947).[28]

27/ See n. 21, supra at 42.

28/ In United States v. Seeger, all claimants, regardless of religious background, must qualify for objector status. 380 U.S. at 185. In Sherbert, individualized exemption was required for Saturday worshippers just as it would be for Sunday observers who would otherwise be required to work on that day during a period of national emergency. 374 U.S. at 406.

The fact that a public benefit is involved does not permit imposition of a religiously based test of eligibility. See: Speiser v. Randall, 357 U.S. 513, 518 (1958). The school prayer decisions recognize that an exemption process may carry a stigma which "operates to pressure conformity," School Board of Abington v. Schempp, 374 U.S. at 288-290 (Brennan, J., concurring); Engel v. Vitale, 370 U.S. at 431. Given that the Hyde Amendment embodies an explicit moral condemnation of the decision to have an abortion rather than undergo a health-threatening pregnancy, the chilling effect of a sincerity test is obvious. Even assuming that such a test could pass muster under the Establishment Clause, see: Torcaso v. Watkins, 367 U.S. 488, this infringement of religious liberty is impermissible since encouraging childbirth at the cost of maternal health is not necessitated by any "serious danger to the public safety." Speiser v. Randall, 357 U.S. at 527. See: Roe v. Wade, 410 U.S. at 163-164.

The First Amendment burdens of a sincerity test are compounded because it would dangerously delay access to abortion. In Doe v. Bolton, this Court struck down far less onerous screening and approval procedures as lacking substantial jurisdiction. 410 U.S.

179, 197-199 (1973). It is one thing to constitute a board of physicians regularly at the hospital; it is another to constitute a board of appropriate ministers or others purportedly qualified to test the sincerity of the convictions of those women who seek abortion. Putting aside even the religiously discriminatory nature of an exemption, the intervening defendants' suggestion is completely unjustifiable.

In sum, even-handed respect for religious and conscientious conviction recognized by Congress and required by the First and Fifth Amendments can be guaranteed only by invalidating the Hyde Amendments.

C. The Hyde Amendments Do Not Merely Parallel The Religious Belief That The Fetus Is Human Life; They Embody and Advance It.

Of the defendants, only the Solicitor addresses the Establishment Clause issue. His suggestion that the Hyde Amendments parallel rather than embody the religious doctrine that abortion is murder ignores the factual findings of the district court and the settled principles established by this Court.

The Solicitor selectively quotes McGowan v. Maryland, 366 U.S. 420 (1961), for the obvious proposition that simply because a law coincides with a religious tenet does not create an establishment problem. Brief of the Secretary at 28-29.[29/] He omits, however, the sentence underlined below which joins the two passages he quotes and which states the applicable test of secular purpose:

> [T]he "Establishment" Clause does not ban federal or state regulation

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29/ It is also obvious that a clever turn of phrase cannot reduce the Hyde Amendment into a law which merely "provokes different reactions among religious groups" or "elicits greater approval from one religious denomination or sect than from another." Brief of the Secretary at 29.

> of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal ...

366 U.S. at 442.[30/] The district court's findings of fact preclude the legal conclusion that there is a secular purpose for the Hyde Amendment "wholly apart" from the religious belief that an inviolable human being is created at conception. Brief of Appellees, Facts, §§10, 11, 12.

The test is not, as the government suggests, whether the belief is exclusively religious[31/] or solely attributable to one

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30/ Justice Frankfurter, concurring, explains that if "all secular ends which ... [a law] purportedly serves are derivative from, not wholly independent of, the advancement of religion--the regulation is beyond the power of the state." Id. at 466.

31/ Sacred and secular concerns are rarely wholly exclusive of one another. St. Thomas Aquinas said of theology that it "uses for its service all the other sciences, as though its vassals." Aquinas, Prologue to Commentary of IV Books of Sentences, reprinted in An Aquinas Reader (M. Clark, ed. 1972) at 411, cited

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church.[32/] Brief of the Secretary at 29. Rather, it is whether there is a substantial

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in Malnak v. Yogi, 592 F.2d 197, 209 (3d Cir. 1979) (Adams, J., concurring). Conversely religiously enjoined practices do not spring from revelation alone, but respond to concrete secular concerns; for example, even in their origin, the kosher laws or the command to keep the Sabbath were necessary to health and social well-being. See, e.g.: McGowan v. Maryland, 366 U.S. at 489, n. 57.

By the same token, the preaching and acceptance of religious doctrine equating fertilization with the divine creation of a human being may be influenced by biological or philosophical considerations; or it may serve to enforce a strict code of sexual morality. But such influences or purposes do not make the belief that the fetus is human life -- pressed as a matter of divine truth and law in the drive to stop abortion -- any less religious or offensive to the Establishment Clause. See: Committee for Public Education v. Nyquist, 413 U.S. 756, 783 (1973), citing School District of Abington v. Schmepp, 374 U.S. at 278-281 (Brennan, J., concurring); Malnak v. Yogi, 592 F.2d at 209.

32/ The plaintiffs have not, as the government suggests, argued that the Hyde Amendment enacts only Roman Catholic doctrine. The belief that the fetus is human life is shared by a number of denominations, as well as by some religious individuals dissenting from their denomination's position. Brief of Appellees, Facts, §9(a), (c). The dominance of the Roman Catholic Church in the anti-abortion movement and its essential role in generating the pressures that produced the

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secular concern which is wholly independent, not simply derivative, of the religious concern. Applying that test, this Court has looked to the relative importance or the predominance of the religious as opposed to secular concerns[33/] and has struck down laws as impermissibly religious where, despite secular purposes, the religious purpose was pervasive.[34/]

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Hyde Amendments should not be confused with exclusivity. Id. at §11(a). The record also demonstrates that the "right to life" effort embraces different religious traditions and is, itself, a religious movement. Id. at §§9(a), (c), 11(b).

33/ McGowan found the secular concerns not only distinct but unquestionably predominant. 366 U.S. at 444-445, 448-449 and 497, 504 (Frankfurter, J., concurring). Indeed, if a law could pass the secular purpose test simply because of some minor secular purpose, it would hardly have been necessary to trace so painstakingly the history of the Sunday closing laws, since their recreational purposes are plain on their face. 366 U.S. at 423-424.

34/ In School District of Abington v. Schempp, the majority rejects the school board's contention that Bible reading serves secular purposes among which are "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S. at 223. The Court views the practice as

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The Solicitor appears to suggest that Epperson v. Arkansas, 393 U.S. 97 (1968), applies a stricter test, requiring that there be absolutely no secular justification but rather a wholly religious one. Id. at 107-108. Brief of the Secretary at 29, n. 15. But Epperson involved no greater influence of religious belief than this case.

In Epperson, the State of Arkansas asserted as secular a purpose very similar to that put forward here: the right to withdraw (from the curriculum) a highly controversial and disruptive subject in order, purportedly, to remain neutral. 393 U.S. at 113 (Black, J., concurring). Brief of the State of Arkansas at 30, Epperson v. Arkansas. The majority recognized that neutrality was not a wholly independent secular purpose but a reflection of the religious views of some

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religious in character, even if its purposes are not "strictly religious," because "the place of the Bible as an instrument of religion cannot be gainsaid" and the law evidenced recognition of the "pervading religious character of the ceremony." Id. at 224 (emphasis added).

citizens. 393 U.S. at 107.[35] The "traditionalist" label, used by both the Solicitor and the district court to characterize the anti-abortion view, slip op. at 323-324; Brief of the Secretary at 28-30, does not obscure the religious nature of a law any more than does the label of "neutrality." The belief that conception is the creation of a human being is as religious as the creationist view of the world enacted in the Epperson law, and characterized in its time as traditionalist.[36]

35/ It is also pointedly parallel that it was claimed in Epperson that taxpayers should not be coerced into financing the teaching in the public schools of a view which was to them heretical and evil. 393 U.S. at 99, n. 3, 108, n. 16. The same rationale was used a generation earlier to support the conclusion that the identical Tennessee law was "purely an act of neutrality." Scopes v. State, 154 Tenn. 105, 289 S.W. 363, 369 (1927) (Chambliss, J., concurring).

36/ Here again, comparison between Epperson and Scopes is especially instructive. The Scopes majority rejected the claim that the law established religious belief because of the absence of unanimity on the subjects of evolution and creation within any religious tradition. 289 S.W. at 367. Justice Chambliss, concurring, upheld the law because a non-theistic theory of evolution is "inconsistent, not only with the common belief of mankind of every clime and creed and 'religious establishment,' ... but inconsistent also with

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The government also obscures another principle of Establishment Clause analysis -- i.e., that the inquiry into secular purpose must be based in the present and not the past. McGowan warns against transferring a finding of clear secular purpose from one case to another:

> Finally, we should make clear that this case deals only with the constitutionality of §521 of the Maryland statutes before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose -- evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect -- is to use the state's coercive power to aid religion.

366 U.S. at 453. In other words, if in response to a perceived danger of declining religious observance a movement developed which succeeded in eliminating the recreational exceptions in the Sunday closing laws, the Court would have to examine the establishment claim afresh.

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our Constitution and the fundamental declaration lying back of it, through all of which runs recognition of and appeal to 'God.'..." Scopes v. State, 289 S.W. at 368.

Roe v. Wade's historical examination demonstrates that whereas the nineteenth century criminal abortion laws were justified by the clearly secular purpose of protecting maternal health, the only purpose for limiting abortion today is the asserted interest in fetal life. 410 U.S. 113, 147-153 (1973). Distinguishing the legitimate interest in the fetus as potential human life, 410 U.S. at 159-163, Roe v. Wade allowed no sacrifice of maternal health to potential human life, and Maher v. Roe reaffirmed this principle. 432 U.S. at 472. Here, Congress exacts this very sacrifice and makes clear that the Hyde Amendments are rooted in the single belief, from which all other arguments are derived, that the fetus is actual human life.

The question is whether describing this belief as "traditionalist" meaningfully distinguishes it as wholly secular. Although McGowan makes clear that the answer to this question must ultimately be found in the present, it is notable that restrictions on abortion based on the protection of fetal life have traditionally been "inextricably intertwined" with religious notions of animation or ensoulment. Cf. Lemon v. Kurtzman, 403 U.S. 602, 616-617 (1971); Meek v.

Pittenger, 421 U.S. 349, 366, 370-372 (1975). The government cannot invoke either the Pythagorean school of Greek ethical philosophy or the exponents of the English common law as "secular sources." Brief of the Secretary at 30. Edelstein's treatise, The Hippocratic Oath, relied on in Roe v. Wade, makes clear that the Oath was not an expression of medical ethics but of the Pythagorean school's dogmatic religious belief concerning ensoulment.[37/] 410 U.S. at 131-132. Roe v. Wade also recognizes that the quickening distinction in the common law also embodied notions of animation or ensoulment. 410 U.S. at 132-136. Far from providing any distinct secular basis for viewing the fetus as actual human life from the moment of conception, these

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37/ Edelstein writes:

> For the physician, when forswearing the use of poison and of abortive remedies adds: "In purity and in holiness I will guard my life and my art." ... The demand for holiness ... can hardly be understood as resulting from practical thinking or technical responsibility. Holiness belongs to another realm of values and is indicative of standards of a different, a more elevated character.

L. Edelstein, The Hippocratic Oath, 12-13 (1943). Edelstein also points out that the Pythagoreans "held that the embryo was an animate being from the moment of conception." Id. at 16. Contrast different views on animation cited in Roe v. Wade, 410 U.S. at 133, n. 22.

historical sources, as well as more recent ones, underscore the central importance of religious concepts.[38]

Nor can the government escape the force of the record by asserting that the passage of anti-abortion laws following Roe v. Wade was "the product of deeply felt public sentiment and not an outgrowth of the political activities of a single religious group." Brief of the Secretary at 30-31. The record does not support this contention. While plaintiffs did not focus their proof on this period, the record supports only the contrary proposition -- that the primary opposition to liberalization of abortion laws in the late 60's and early 70's was religious.[39] This

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38/ See: Roe v. Wade, 410 U.S. at 159-161; T. Clark, "Religion, Morality and Abortion: A Constitutional Appraisal," 2 Loyola (L.A.) L. Rev. 1 (1969); L. Tribe, "1973 The Supreme Court-Foreword," 87 Harv. L. Rev. 1 (1973); ALI Model Penal Code §207.11, Comment at 146-151, 156 (Tent. Draft No. 9, 1959).

39/ See, for example, Pl. Exh. 132/T.3193; L.IV-3; Wood, T.3198-3199; Brief of Appellees at 101, n. 144; and Hearings Before the Subcommittee on Constitutional Amendments of the Senate Committee on the Judiciary, 93rd Cong., 2nd Sess., on S.J. Res. 119 and S.J. Res. 130," Vol. I (Abortion-Part I) (1974), pp. 153-253, which illustrate the early efforts of the Roman

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Court can also take judicial notice, as it did in Roe v. Wade, of sources which document the central role of the Roman Catholic Church, together with other religiously motivated groups, in the opposition efforts to prevent or counter liberalization of abortion laws.[40]

In the school prayer context, the Court has rejected analogous contentions that an essentially religious law can be saved from

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Catholic Church. The trial court examined the decisive role of the Roman Catholic Church in Minnesota in shaping the political opposition to liberalization. See: Brief of Appellees, Facts, §11(c).

40/ L. Lader, Abortion II (1973); L. Tribe, American Constitutional Law, §15-10, p. 929-930 (1978). We ask this Court to take judicial notice of the following example. Several days before the New York legislature voted in 1972 to repeal that state's liberal abortion law, President Nixon sent a letter to Cardinal Cooke stating: "Recently, I read ... that the Archdiocese of New York, under your leadership, had initiated a campaign to bring about repeal of the state's liberalized abortion laws .... I would personally like to associate myself with the convictions you deeply feel and eloquently express." N. Y. Times, May 7, 1972, at 1, col. 3, and 29, col. 2, cited in Lader, Abortion II, supra at 202. When Governor Rockefeller vetoed the repeal, he explained: "The extremes of personal vilification and political coercion brought to bear on members of the legislature raise serious doubts that the votes to repeal the reform ... represented the will of ... the people." N. Y. Times, May 14, 1972, at 62, col. 3, cited in Tribe, American Constitutional Law, at 930, n. 63.

invalidity under the establishment clause by characterizing it as "traditionalist." In Engel v. Vitale, school authorities urged to no avail that the nondenominational prayer was "based on our spiritual heritage." 370 U.S. 421 at 425 (1962). That the Baltimore law invalidated in Schempp dated from 1905, 374 U.S. at 211, or, indeed, that Bible reading may have been tolerated in the time of the framers, did not save the practice under review. Mr. Justice Brennan, noting the "profound changes" in the religious composition of our society, wrote:

> [O]ur use of the history of their time must limit itself to broad purposes, not specific practices .... By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "a constitution we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

374 U.S. at 241 (emphasis in original).

Likewise here, the Court must base its decision on the centrally religious and highly

charged nature of the present-day restrictions on abortion based on the belief that the fetus is human life.[41/] There is simply no evidence in this record upon which traditionalist morality independent of religious belief can be confidently discerned.[42/] Rather, the facts as found by the district court demonstrate that the present-day effort to restrict abortion -- even in its purportedly secular form -- is impelled by a notion of divine truth and a duty to enact God's law and protect God's creation in the fertilized egg. The record establishes the predominantly and pervasively religious nature -- as well as the impermissible and dangerous

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41/ See: Tribe, "1973 The Supreme Court-Foreword," supra, n. 38 at 60, at 23, n. 106.

42/ The lower court notes the possibility that right reasoning could lead a person to accept the human life tenet without reference to religious doctrine, but concludes that nonetheless the belief is adamantly asserted as religious. Slip op. at 228. Referring to the debates, the lower court also notes that "much other argument ... in the debates ... was free of religious reference," but cannot say "whether or not the debators were motivated by their religious convictions." Slip op. at 275.

religious effects -- of this effort and of the Hyde Amendments it produced.[43/]

43/ The Solicitor's suggestion that to examine the role of religious groups in the legislative process would impermissibly "chill" religious participation is absurd. Brief of the Secretary, at 31, n.16. Invalidation of the Hyde Amendments under the Establishment Clause in no way threatens the right of religious persons and organizations to participate in the political process. Everyone has a right vigorously to seek to enact their beliefs into law; no one, whether espousing religious belief or racial superiority, has a right to contend that the product of their efforts is above constitutional scrutiny. As Mr. Justice Brennan wrote in McDaniel v. Paty: "The antidote which the Constitution provides against zealots who would inject sectariansim into the political process is to subject their ideas to refutation in the marketplace of ideas and their platforms to rejection at the polls. With these safeguards, it is unlikely that they will succeed in inducing government to act along religiously divisive lines, and, with judicial enforcement of the Establishment Clause, any measure of success they achieve must be short-lived, at best." 435 U.S. 618, 642 (1978)(emphasis added).

Beyond that, religious involvment is relevant in establishment analysis in the rare case where the law at issue and the involvment examined are based on explicitly or intrinsically religious premises which are focal in the dispute, and where the role of religion is predominant. When religion bases political activity on secular premises widely understandable, no question is presented, even if religious institutions predominate. Or where, as is the common case, religious institutions participate alongside substantial, heterogeneous secular constituencies, articulating distinct secular concerns, religious participation does not render the law suspect.

IV. THE INTERVENING-DEFENDANTS' INTERPRETATION OF TITLE XIX IS INCONSISTENT WITH THE PLAIN WORDS OF THE STATUTE, ITS CLEAR LEGISLATIVE HISTORY, THE CONSISTENT REGULATORY INTERPRETATION OF SUCCESSIVE SECRETARIES OF HEW, AND THE POSITION OF THE SECRETARY IN THE PRESENT CASE.

The Secretary takes the position that: "The statute and regulation would be violated if a state were to single out medically necessary abortions for exclusion from coverage, because such action by a participating state would constitute a denial of payments based solely on diagnosis (i.e. that an abortion is medically necessary) and condition (i.e. pregnancy)." U.S. Brief in Zbaraz, at 43-44, n.23. In our opening brief, we relied upon the Brief of Appellees in Williams v. Zbaraz (hereinafter "Zbaraz Appellees' Brief") in support of the contention that the Act and regulations require states participating in Medicaid to include medically necessary physician and hospital services, and prohibit exclusion of medically necessary services. The intervenors here take issue with both the United States and the Appellees in Zbaraz and McRae. In general, the points they raise have been anticipated in the Zbaraz briefs; we restrict our response to points that the Zbaraz

appellees and the United States did not specifically address in their Zbaraz briefs.

The intervenors note (Int-Def. Brief at 77) the canon of statutory construction that effect should be given to every word of a statute. They do not follow their admonition, however, in discussing the requirement of 42 U.S.C. §1396a(a)(13)(B) mandating "inclusion of at least the care and services" listed in 42 U.S.C. §1396d(a)(1)-(5). The Secretary of HEW filed a Supplemental Brief in the Appeal in Rush v. Poythress, No. 77-2542 (Fifth Circuit, April 8, 1980)(hereinafter "Brief of the Secretary in Rush"),[44/] explicating the duties which four statutory provisions impose upon states participating in the Medicaid program: 42 U.S.C. 1396, 42 U.S.C. 1396a(a)(13)(B), 42 U.S.C. 1396a(a)(17), and 42 U.S.C. 1396d(a)(1)-(5). This brief makes plain that "the legislative history of the Medicaid act emphasizes the provision of a minimum program of medical benefits consisting of services within the five

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[44/] Plaintiffs-appellees are lodging a copy of the Supplemental Brief of the Secretary in Rush with the Court.

mandatory categories listed in 42 U.S.C. 1396d(a)(1)-(5). See 42 U.S.C. 1396a(a)(13)(B)." Id. at 7.

Further, intervening-defendants do not come to grips with the legislative history and language of 42 U.S.C. §1396a(a)(17). See Brief for Zbaraz Appellees at 76-77; U.S. Brief in Zbaraz at 44, n.23. Intervenors' analysis of that statute accordingly rests upon little more than a mischaracterization of this Court's holding in Beal v. Doe, 432 U.S. 438 (1977) and the assertion that because the Act generally limits coverage of services to those that are medically necessary, it somehow must be interpreted to permit the states to limit services to those they consider "reasonable" and "consistent with the objectives" of the Act. See Int-Def. Brief at 77.[45/]

[45/] Intervening-defendants' misunderstanding of Section 1396a(a)(17) makes it unnecessary to respond at any length to their labored effort to establish that the exclusion of medically necessary abortion services is both "consistent with the objectives" of the Medicaid Program, and statutorily "reasonable." Int-Def. Brief at 88-94. Three points only need be made. First, they concede that "countervailing interests or circumstances" may affect the "weight that can or ought

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This interpretation is flatly rejected by HEW, which concludes that

> the language and legislative history of 42 U.S.C. 1396a(a)(17) indicates that Congress intended to give the states broad discretion to set eligibility-related requirements--e.g., the level of income and resources that individuals could have and still be eligible, or the comparability of financial eligibility requirements

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to be given" to the state's interest in "fetal life" under the Act. Int-Def. Brief at 89. In this context, and accepting arguendo, intervenors' construction of Section 1396a(a)(17), the weight assigned to that interest in deciding whether a state must fund medically necessary services under a program whose objective is to provide medically necessary care for the poor is far less substantial than in deciding whether a state must cover elective services under the same program. See Zbaraz Appellees' Brief at 76-77; 81-83. See also id. at 38-58 passim. Second, they effectively concede the insubstantiality of the argument--pressed so vigorously by intervenors in Zbaraz--that the state has any fiscal interest in excluding medically necessary abortion services. See Int-Def. Brief at 89-90. Third, their strenuous effort to equate medically necessary and elective abortions, and to establish that there ordinarily are equally effective alternative forms of treatment to medically necessary abortions simply ignores the record in this case, and in Zbaraz. See A.149, 297; Zbaraz Appellees' Brief at 13-20, Point I, Sec. B, supra.

> for each categorical group of Medicaid recipients--but that Congress did not intend to authorize the states to exclude types of medically necessary services from coverage.... [Thus] states must pay for all medically necessary types of services falling within the mandatory categories unless Congress relieves them of that responsibility by adopting its own funding restrictions. Brief of the Secretary in Rush at 7.

Intervening-defendants assert that the phrase "necessary medical services" in the Preamble to the Medicaid Statute, 42 U.S.C. §1396, refers to the class of persons who need assistance, rather than the nature or scope of the services mandated to be provided by the states. Int-Def. Brief at 69. Official HEW position is that "the phrase 'necessary medical services' does not have such a limited application. Rather, it constitutes "the legislative statement of the purpose of the Act," and defines the medically necessary services as the "irreducible minimum coverage which states must provide." Rush v. Parham, 440 F.Supp. 383, 389 (N.D.Ga. 1977), adopted by HEW in Brief of the Secretary in Rush at 8.

Intervening-defendants mischaracterize HEW's position on the requirements of the

Social Security Act in this case and Zbaraz as a "change". Int-Def. Brief at 84, n.19. Rather, the consistent position of HEW, adopted when Title XIX was enacted in 1965 and consistently reiterated since then, has been that: "Limitations may not be set by eliminating certain groups of patients or certain diagnoses from coverage...." HEW Handbook of Public Assistance Administration, Supplement D, §D-5140, issued June 14, 1966.[46/]

[46/] When the regulation was initially codified from the Handbook in 1970, it required that medical and remedial care and services provided under Medicaid

> [m]ust be sufficient in amount, duration and scope to reasonably achieve their purpose. With respect to the required services...the state may not arbitrarily reduce amount, duration and scope of such services to an otherwise eligible individual solely because of the diagnosis, type of illness or condition. Appropriate limits may be placed on services based on such criteria as medical necessity or those contained in utilization or medical review procedures. (Emphasis added.) 45 C.F.R. §249.10 (a)(5)(1970-79).

This regulation was recently recodified, in substantially similar form. It now provides:

> (a) The plan must specify the amount and duration of each service that it provides.

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As this Court noted in Beal v. Doe, 432 U.S. 438, 447 (1977), the Department of Health, Education and Welfare is "charged with the administration of this complicated statute," and "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong...." Here, as we have shown, the Secretary's reading of the legal requirements is firmly grounded in the statute, and has been consistently maintained.

This Court has long recognized that:

> So long as this regulation is extant it has the force of law.... So long as this regulation remains in force the Executive Branch is bound by it, and indeed the United States

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> (b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.
> (c)(1) The medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.
> (2) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

42 C.F.R. §440.230 (1979).

> as the sovereign composed of three branches is bound to respect and enforce it. United States v. Nixon, 418 U.S. 683, 695 (1974); Lewis v. Martin, 397 U.S. 552 (1970).

Intervenors attempt to use the fact that the Secretary has approved Medicaid plans in states that limit abortion funding to life-threatening circumstances as proof of "...the freedom accorded the States...." Int-Def Brief at 84 n.19. This totally ignores the position of HEW that lack of federal funding suspends underlying obligations which resume once funding is resumed. U.S. Brief in Zbaraz at 19.

The principle that the Medicaid statute prohibits exclusions on the basis of diagnosis or condition is of essential importance to the fair and even-handed administration of this complex program to meet the medical needs of the poor.[47/] Successive

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47/ For example, White v. Beal, 555 F.2d 1146 (3rd Cir. 1977), affirming 413 F.Supp. 1141 (E.D. Pa. 1976), struck down a Pennsylvania provision that allowed Medicaid payments for eyeglasses for people with eye pathology, but denied payments for people with refractive error. Dodson v. Parham, 427 F. Supp. 97 (N.D. Ga. 1977), invalidated a drug formulary that made drugs inaccessible to patients with particular conditions. While many federal

(footnote continued on next page)

Secretaries, some of whom were profoundly opposed to abortion, have consistently retained the prohibition on diagnosticly-based exclusions in the face of congressional action withdrawing funds, on the basis of diagnosis and condition for a single medically necessary service, i.e. abortion. This simply confirms that the prohibition on diagnostic-based exclusions is of quintessential importance in the sensible administration of Medicaid.

Finally, intervening-defendants' discussion of the PSRO provisions (Int-Def. Brief at 77-84) is fundamentally flawed. The analysis at 81-85 of the Zbaraz Appellees' Brief makes a catalogue of intervenors' errors unnecessary. But a few related misconceptions merit emphasis. First, it is not the PSRO's, but individual physicians, who determine in

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(footnote continued from preceding page)

courts have enforced the prohibition on diagnosticly-based exclusion, no federal court has ever approved a state effort to exclude Medicaid payments for a particular medical diagnosis or condition, except a Utah district court, in a Medicaid abortion decision that was subsequently reversed by the 10th Circuit. D.R. v. Mitchell, 456 F. Supp. 609 (D.Utah 1978) rev'd 78-1675 (10th Cir., March 10, 1980).

the individual case that the provision of particular services is medically necessary; their determinations are, of course, subject to PSRO review, in accord with the PSRO norms. See 42 U.S.C. §§1320c-4, 1320c-5, 1320c-9. Second, the unsupported suggestion (Int-Def. Brief at 81-83) that judgments made about the medical necessity of abortion are analytically different from other types of medical judgments, and therefore the state can assume responsibility for evaluating pregnancies, ignores the record in this case and in Zbaraz. Appellees' Brief at 26-60; Zbaraz Appellees' Brief at 13-20. Third, their argument wholly subverts the fundamental purpose of PSRO peer review, which is precisely to assure that physicians, not state officials, will make judgments about medical necessity under the Medicaid program. See Zbaraz Appellees' Brief at 81-82.

Bereft of support in the language of the Act, its legislative history, or HEW regulations, the intervenors fall back upon the argument that abortion is somehow "unique in a manner which permits special funding limits with regard to it." Int-Def. Brief at 94. (Initial capitalization in heading omitted). For that view, they rely principally upon the

illegality of abortions in most states in 1965, when the Medicaid program was established. Id. at 97-101. That reliance is misplaced. See Zbaraz Appellees' Brief at 93-96.[48/]

48/ Intervenors go on to argue that the subsequent legalization of abortion in all the states does not affect their analysis. To buttress this point, they hypothesize that a state decriminalizes marijuana and covers it under Medicaid (i.e., as a drug) to treat glaucoma. On this assumption, they then assert that our reading of the statute would require coverage of marijuana when recommended by a physician as "medically necessary" to "relax his nervous patients or cheer up his depressed ones." Int-Def. Brief at 102.

The analogy intervenors draw is faulty. Drugs are, of course, an optional service, and a state might entirely exclude them from coverage. If, however, a state elected to cover drugs, it would still not have to cover marijuana for treatment of a particular condition, e.g. glaucoma, absent both FDA approval and legalization in the state of marijuana as a drug for that explicit purpose. A state could not deny that drug to a glaucoma victim solely because that treatment was illegal in 1965. Whether or not the use of marijuana were medically necessary to treat glaucoma in a particular case, would be a determination of an individual's physician subject to PSRO peer review. Medicaid does not finance whiskey, even though it might cheer some people up; it doesn't fund food, even though food cures malnutrition. But the mandatory physician and hospital services necessary to treat women for the complications of pregnancy which have always fallen within the statutory ambit now include medically necessary abortion services. See Zbaraz Appellees' Brief at 94-96. Nor can a state restrict a provision under Medicaid because of the diagnosis, illness, or condition of the Medicaid recipients--whether that is glaucoma or health-endangering pregnancy. 42 C.F.R. §440.230 (1979).

CONCLUSION

For the reasons stated, the Hyde Amendments violate the First and Fifth Amendments, and the judgment of the lower court should be affirmed.

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